Kenanga Innovasi Sdn Bhd v Toh Kin Lam & Ors

HIGH COURT (MELAKA) — CIVIL SUIT NO 22–113 OF 2000
LOW HOP BING J
5 APRIL 2006

Civil Procedure — Trial — Affidavit — Trial by affidavit evidence — Evidence adduced by the parties sharply conflicting — The safer approach to be taken

Contract — Sale and purchase of land — Variation — Whether parties had agreed to vary terms of agreement — Whether there was any variation of the SPA pertaining to the rate of interest from 10% per annum to 1%

Contract — Construction of terms of contract — Intention of parties — Whether defendants entitled to claim the varied interest on the balance sum after the termination of the SPA — Whether the four extensions granted and the forfeiture of 10% of the purchase price are separate and distinct elements

The plaintiff as purchaser claims for the refund of RM250,075 being the excess of the purchase price paid to the defendants as vendors in respect of the sale and purchase of 24 lots of agricultural land. The defendants' counterclaim is for RM112,946.93 being the balance of interest due by the plaintiff to the defendants. In 1996, the plaintiff paid the defendants a total sum of RM972,573.30, leaving a balance of RM6,252,409.71 ('the balance sum'). The defendants had given the plaintiff four extensions of time viz up to 31 October 1996. Upon the plaintiff's default in paying the balance sum at the expiry of the fourth extension, the defendants terminated the Sale and Purcahse Agreements (SPA) on 6 May 1997. By consent, the parties have proceeded with the trial of this action by affidavits only. By consent of the parties, the agreed questions for determination were: (1) whether there was any variation of the sale and purchase agreements pertaining to the rate of interest from 10%pa to 1% per month for the four extensions of time in order to enable the plaintiff to pay the balance sum?; (2) if the answer to question (1) is in the negative, is the plaintiff entitled to a refund in excess of 10% from the defendants after the termination of the SPA?; and (3) if the answer to question (1) is in the affirmative, are the defendants entitled to claim the varied interest on the balance sum after the termination of the SPA?

Held, allowing the defendants' counterclaim with costs:

(1) From the affidavits, it is abundantly clear that the parties have embarked on several discussions in relation to the extensions of time and the variation of

interest for such extensions. The evidence adduced by the parties respectively in their affidavits pertaining to the existence or otherwise of the oral agreement on the variation is sharply conflicting. Therefore the safer approach as set out by Chang Min Tat FJ (as he then was) for the Federal Court in *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229, ie to refer to and rely on the witness' (here, the deponents') acts and deeds which were contemporaneous with the event and to draw reasonable inferences from them, adding that judicial reception of evidence requires that the oral evidence (in the instant case, the affidavits) be critically tested against the whole of the other evidence (in the instant case, by way of affidavits) and circumstances of the case, and that plausibility should never be mistaken for veracity (see para 43).

(2) Although negotiations for extensions of time and the variation were oral in nature, these terms and conditions have been expressly stated in the letters of the defendants' solicitor to the plaintiff and the plaintiff's solicitor. The fact that the plaintiff's chief executive officer had found it necessary to request the defendants for a waiver of the variation for the month of January 1997 is an unqualified acceptance of the variation and an affirmation of the oral supplementary agreement between the parties, which clearly fortifies and strengthens the defendants' version (see para 46).

(3) The payment of interest for the four extensions and the forfeiture of 10% of the purchase price are separate and distinct elements, to both of which the defendants are entitled (see *Paramount Corporation Bhd v Mulpha Pacific Sdn Bhd* [1999] 5 CLJ 539, HC). There can be no doubt that the granting of the four extensions was subject to the variation which has to be paid whether or not the SPA has been terminated (see para 74).

[Bahasa Malaysia summary

Plaintif sebagai pembeli menuntut bayaran balik RM250,075.00 yang merupakan lebihan harga belian yang dibayar kepada defendan-defendan sebagai penjual-penjual berhubungan dengan perjanjian jual beli 24 lot tanah pertanian. Defendan-denfendan menuntut balas RM112,946.93 yang merupakan baki faedah yang perlu dibayar oleh plaintif kepada defendan-defendan. Pada tahun 1996, plaintif telah membayar kepada defendan-defendan jumlah RM972,573.30, dengan jumlah baki RM6,252,409.71 ('jumlah baki'). Defendan-defendan telah memberikan empat lanjutan masa iaitu sehingga 31 Oktober 1996 kepada plaintif. Setelah plaintif gagal membayar baki jumlah selepas tamatnya tempoh lanjutan masa, defendan-defendan telah menamatkan perjanjian-perjanjian jual beli pada 6 Mei 1997. Dengan persetujuan, pihak-pihak telah meneruskan perbicaraan tindakan ini melalui afidavit-afidavit sahaja. Dengan persetujuan pihak-pihak, soalan-soalan yang perlu ditentukan adalah: (1) sama ada terdapat sebarang variasi perjanjian-perjanjian jual-beli berhubungan dengan kadar faedah dari 10% setahun kepada 1% setahun untuk empat lanjutan masa agar plaintif dapat membayar baki jumlah?; (2) jika jawapan kepada soalan (1) adalah tidak, sama ada plaintif berhak kepada satu bayaran balik lebih daripada 10% daripada defendan-defendan selepas penamatan perjanjian-perjanjian jual-beli tersebut?; dan (3) jika soalan (1) adalah ya, sama ada

defendan-defendan berhak kepada tuntutan variasi faedah di atas baki jumlah selepas penamatan perjanjian-perjanjian jual-beli tersebut? A

Diputuskan, membenarkan tuntutan balas defendan dengan kos: B

(1) Daripada afidavit-afidavit, adalah jelas bahawa pihak-pihak telah memulakan beberapa perbincangan berhubungan dengan lanjutan masa dan variasi kepada faedah-faedah untuk lanjutan tersebut. Bukti yang dikemukakan oleh pihak-pihak masing-masing di dalam afidavit-afidavit mereka berhubung dengan adanya atau tidak perjanjian secara lisan variasi tersebut adalah jelas bercanggah. Oleh itu, cara mengendalikannya dinyatakan oleh Chang Min Tat FJ (pada ketika itu) untuk kes Mahkamah Persekutuan di dalam *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 iaitu merujuk kepada dan bergantung terhadap tindakan dan perbuatan saksi-saksi (disini, deponen-deponen) yang sezaman dengan peristiwa dan menarik kesimpulan yang munasabah daripada situ, tambahan pula penerimaan bukti-bukti oleh kehakiman memerlukan bukti-bukti lisan (dalam kes ini, afidavit-afidavit) diuji secara kritikal dengan keseluruhan keterangan lain (dalam kes ini, melalui afidavit-afidavit) dan keadaan kes tersebut, dan bahawa kemunasabahan tidak seharusnya disilapkan sebagai ketepatan (lihat perenggan 43). C D E

(2) Walaupun perbincangan-perbincangan untuk lanjutan-lanjutan masa dan variasi adalah secara lisan, terma-terma dan syarat-syarat telah dinyatakan secara jelas di dalam surat-surat peguamcara defendan-defendan kepada plaintif dan peguamcara plaintif. Fakta bahawa pegawai ketua eksekutif plaintif telah mendapati ia patut memohon defendan-defendan untuk satu penepian variasi untuk bulan Januari 1997 adalah satu penerimaan variasi yang tidak terbatas dan satu affirmasi perjanjian tambahan secara lisan di antara pihak-pihak, yang dengan jelas memperkuatkan dan memperkukuhkan versi defendan-defendan (lihat perenggan 46). F

(3) Pembayaran faedah untuk empat lanjutan tersebut dan perlucutan 10% daripada harga belian adalah elemen yang berasingan dan berbeza, dimana defendan-defendan berhak kepada kedua-duanya (lihat *Paramount Corporation Bhd v Mulpha Pacific Sdn Bhd* [1999] 5 CLJ 539, HC). Tiada keraguan bahawa pemberian empat lanjutan masa adalah tertakluk kepada variasi yang mana ia harus dibayar sama ada perjanjian jual-beli ditamatkan atau tidak (lihat perenggan 74).] G H

Notes

For cases on trial of civil procedure, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3483–3485. I

For cases on variation of contract, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 4351–4353.

For cases on contruction of terms of contract, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2762–2776.

Cases referred to

Chiong Ah Hui v Ban Choon Co (Pte) Ltd [1989] 2 MLJ 296 (refd)
Eng Mee Yong & Ors v V Letchumanan [1979] 2 MLJ 212 (refd)
Industrial Concrete Products Bhd v Concrete Engineering Products Bhd [2001] 2 MLJ 332 (refd)
MBf Finance Bhd v Sim Peng Bee@ Sim Bay Bee & Anor [2003] 5 MLJ 303 (refd)
Mulpha Pacific Sdn Bhd v Paramount Corp Bhd [2003] 4 MLJ 357 (refd)
Nuri Asia Sdn Bhd v Fosis Corporation Sdn Bhd [2006] 5 CLJ 307 (refd)
Paramount Corporation Bhd v Mulpha Pacific Sdn Bhd [1999] 5 CLJ 539 (refd)
Paul Murugesu s/o Ponnusamy v Cheok Toh Gong & Ors [1996] 1 MLJ 843 (refd)
Public Bank Berhad v Pan Pacific Asia Bhd [2005] 5 MLJ 693 (refd)
Segar Restu (M) Sdn Bhd v Wong Kai Chuan & Anor [1994] 3 MLJ 530 (refd)
Tenaga Nasional Berhad v Perwaja Steel Sdn Bhd [1995] 4 MLJ 673 (refd)
The Ka Wah Bank Ltd v Nadinusa Sdn Bhd & Anor [1998] 2 MLJ 350 (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229 (refd)
Voo Min En & Ors v Leong Chung Fatt [1982] 2 MLJ 241 (refd)
Yeoh Kim Pong Realty Ltd v Ng Kim Pong [1962] MLJ 118 (refd)

Legislation referred to

Contracts Act 1950 s 7(a)
Evidence Act 1950 ss 91, 92, 101(1)
Sabah Land Ordinance s 104

Karen Cheah Yee Lynn (Fatima Tan & Cheah) for the plaintiff.
SP Chandra (SF Pang & Chandra) for the defendants.

Low Hop Bing J:

CLAIM AND COUNTERCLAIM

[1] The plaintiff as purchaser claims for the refund of RM250,075 being the excess of the purchase price paid to the defendants as vendors in respect of the sale and purchase of 24 lots of agricultural land comprising some 110 acres in the mukim of Sg Udang in the district of Melaka Tengah ('the land') together with interest at 8%pa from 12 April 1997 to the date of realisation and costs.

[2] The defendants' counterclaim is for RM112,946.93 being the balance of interest due by the plaintiff to the defendants together with interest at 8%pa from the date of judgment to the date of realisation and costs.

[3] On 10 April 2002, the plaintiff had obtained judgment in default against the fifth defendant, Toh Kin Tong (deceased) (D5) who is not represented in this action.

[4] The second defendant died on 22 December 2002 and the action devolved upon his widow Lim Ek Huong.

AGREED FACTS

The agreed facts are:

[5] By 24 identical sale and purchase agreements (collectively 'the SPA'), the plaintiff had agreed to purchase the land from the defendants and the purchase price was to be apportioned according to the defendants' respective acreage in the land.

[6] The SPA is valid and treated as one transaction.

[7] The total consideration, RM7,224,983.01 was to be paid as follows:

	Mode	RM
3.1	5% deposit	361,249.15
3.2	5% initial payment	361,249.15
3.3	10% second payment	722,498.30
3.4	80% third and final payment	5,779,986.41

[8] The completion date was 30 September 1996.

[9] In 1996, the plaintiff has on 12 February, 2 April, 22 May, 30 September and 7 October paid the defendants a total sum of RM972,573.30, leaving a balance of RM6,252,409.71 ('the balance sum').

[10] The defendants had given the plaintiff four extensions of time viz up to 31 October 1996 ('the first extension'), 31 December 1996 ('the second extension'), 31 January 1997 ('the third extension') and 30 April 1997 ('the fourth extension').

[11] Upon the plaintiff's default in paying the balance sum at the expiry of the fourth extension, the defendants terminated the SPA on 6 May 1997.

[12] By consent, the parties have proceeded with the trial of this action by affidavits only. Disputed facts are to be resolved by way of finding of facts which will be unfolded later in this judgment on the basis of these affidavits.

AGREED QUESTIONS FOR DETERMINATION

[13] By consent of the parties, the agreed questions for determination are:

(1) Was there any variation of the SPA pertaining to the rate of interest from 10%pa to 1% per month for the four extensions of time in order to enable the plaintiff to pay the balance sum? ('question (1)')

(2) If the answer to question (1) is in the negative, is the plaintiff entitled to a refund in excess of 10% from the defendants after the termination of the SPA? and

(3) If the answer to question (1) is in the affirmative, are the defendants entitled to claim the varied interest on the balance sum after the termination of the SPA?

[14] For brevity and convenience, a reference hereinafter to a clause and a paragraph is a reference to the clause and paragraph in the SPA and the second schedule thereto respectively, unless the context otherwise requires.

TRIAL BY AFFIDAVITS

[15] A trial by affidavits will involve the process of resolving conflicts of evidence contained in these affidavits. In this regard, it is instructive for me to follow the advice of the Privy Council in *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212 delivered by Lord Diplock at p 217E–F right column to the effect that this does not mean that the trial judge is bound to accept uncritically, every statement in an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent or inherently improbable in itself, adding that the judge is vested with a discretion which he must exercise judicially and that it is for him to determine in the first instance whether the statements contained in the affidavits have sufficient prima facie plausibility to merit further investigations as to their truth.

[16] Although the above advice was delivered in an originating summons based on affidavits seeking an order to remove a private caveat, I am of the view that it is applicable *mutatis mutandis* to an action commenced by a writ of summons where, as in the instant case, parties have agreed to proceed with the trial exclusively by way of affidavits.

FINDING OF FACTS ON INTEREST VARIATION

[17] In my view, the issue as to whether there was an agreement pertaining to variation of the rate of interest from 10% pa to 1% per month ('the variation') is a question of mixed fact and law.

[18] The first step towards the resolution of this issue is to determine the burden of proof. Section 101 of the Evidence Act 1950 provides as follows:

> 101 Burden of proof
>
> (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

[19] As the defendants desire this court to give judgment as to the legal right or liability, dependent on the existence of facts which they assert in relation to the existence of an agreement on the variation, the defendants must prove the existence of those facts giving rise to the variation in accordance with s 101(1).

[20] Under s 101(2), the burden of proof lies on the defendants and as this is a civil case, the burden of proof may be discharged by the defendants on a balance of probabilities (see eg *MBf Finance Bhd v Sim Peng Bee@ Sim Bay Bee & Anor* [2003] 5 MLJ 303 pp 311–312A; *Tenaga Nasional Berhad (Formerly Lembaga Letrik Negara Tanah Melayu) v Perwaja Steel Sdn Bhd (Formerly Perwaja Terengganu Sdn Bhd)* [1995] 4 MLJ 673 and *Public Bank Bhd v Pan Pacific Asia Bhd* [2005] 5 MLJ 693 per Abdul Wahab Said Ahmad).

[21] I shall now examine and evaluate the relevant affidavits in order to arrive at a specific finding of facts on this issue.

[22] The defendants rely on three affidavits viz encls (76), (77) and (79), the first of which was affirmed by the defendants' solicitor Miss Pang Siew Fian ('defendants' solicitor') while the other two were affirmed by the fourth defendant Toh Kian Sai ('D4') on his own behalf and also on behalf of the other defendants.

[23] From these three affidavits, it is abundantly clear to me that the parties have embarked on several discussions in relation to the extensions of time and the variation of interest for such extensions.

[24] D4's two affidavits unfolded the negotiations for the sale of the land by the defendants to the plaintiff. In February 1996, the plaintiffs chief executive officer one Steven Soon ('Steven') approached the second defendant, Toh Soo Hock (D2) and D4 and offered to purchase the land from the defendants. After execution of the SPA, the plaintiff did not pay the balance sum in accordance with the dates stated in the SPA. Whenever contractual payments were due, Steven would ask DD2 and 4 to be patient as the plaintiff was waiting for the approval of the bank loan to pay towards the purchase price.

[25] A week before the completion date on 30 September 1996, Steven requested DD2 and 4 for the first extension. DD2 and 4 told Steven that they would grant the extension on condition that the plaintiff pay the sum of RM 1,449,996.60 which was up to the third stage of overdue payments of the purchase price, and also one month's interest for the first extension. Steven told DD2 and 4 that the plaintiff could only effect the overdue payments with interest after the approval of the bank loan. However, when the plaintiff failed to obtain the bank loan, DD2 and 4 informed Steven of the defendants' right to terminate the SPA and forfeited 10% of the purchase price. Steven pleaded with DD2 and 4 for further extension as the plaintiff was prepared to increase the rate of interest together with the balance sum which was to be sourced from the bank loan.

[26] After a series of negotiations between Steven and DD2 and 4 at the office of the defendants' solicitor, Steven orally agreed to pay interest for the first extension at the rate of 1% per month on the balance sum in place of that stated in cl 9. The interest at the varied rate of 1% per month on the balance sum was RM62,524.10 per month. This oral agreement was conveyed to the defendants' solicitor in her office.

A **[27]** Before the expiry of the first extension at the office of the defendants' solicitor, Steven requested the second extension from DD2 and 4 who have again acceded to the plaintiff's request on condition of the variation. Steven, DD2 and 4 then informed the defendants' solicitor of the same.

B **[28]** Shortly before the expiry of the second extension, the defendants' solicitor informed D2 that Steven had called her requesting for a further extension. DD2 and 4 then met Steven in the office of the defendants' solicitor. After discussions, DD2 and 4 gave the plaintiff the third extension subject to the variation which was again duly conveyed to the defendants' solicitor.

C

[29] Before the expiry of the third extension, Steven requested for the fourth extension which DD2 and 4 granted subject to the variation.

[30] As the plaintiff had failed to pay the balance sum on or before 30 April 1997
D on which the fourth extension expired, the defendants terminated the SPA on 6 May 1997 and forfeited a sum of RM722,498.30 being 10% of the purchase price from the sum of RM972,573.30 which the plaintiff had paid to the defendants.

[31] The four extensions ran into seven months. The interest at the varied rate of
E 1% per month on the balance sum was RM62,524.10 x 7 = RM437,668.70.

[32] As the defendants have acceded to Steven's request to waive the interest for the month of January 1997, the total interest payable by the plaintiff to the defendants was RM (437,668.70 -62,524.10) = RM375,144.60.

F

[33] Negotiations for all the four extensions and the variation were carried out orally between Steven for the plaintiff and DD2 and 4 for all the defendants.

[34] The above events were confirmed by the defendants' solicitor in her affidavit
G in encl (76) to which contemporary letters were annexed as exhibits.

[35] Vide letter dated 27 September 1996, defendants' solicitor notified plaintiff's solicitor of the plaintiff's request for the first extension, subject to the variation and seeking confirmation whether the plaintiff was agreeable to, inter alia, this condition.

H

[36] Defendants' solicitor vide letter dated 18 December 1996 informed the plaintiff that the defendants have agreed to the plaintiff's request for the second extension and confirmed the balance sum and a sum of RM123,048.19 being interest thereon payable on or before 31 December 1996. A copy of this letter was extended to the plaintiff's solicitor.

I

[37] On 16 January 1997, defendants' solicitor received a letter from the solicitors for the plaintiff's financier stating that the financier had approved a RM7m loan to the plaintiff towards the purchase of the land to which the defendants solicitor referred to the letter dated 12 January 1997 in which the defendants' solicitor had

confirmed that the third extension was subject to the variation and that the varied interest amounted to RM184,572.30. A copy of this letter was extended to plaintiffs solicitor.

[38] The plaintiff vide letter dated 24 January 1997 signed by Steven as plaintiff's chief executive officer and addressed to the defendants' solicitor appealed for waiver of the varied interest for the month of January 1997 and asked for the balance sum to be furnished to the financier's solicitors. Defendants' solicitor vide letter dated 24 January 1997 to the financier's solicitor confirmed the balance sum and a sum of RM123,048.19 being the varied interest thereon for the months of November and December 1996 thereby acceding the plaintiffs plea for the said waiver. A copy of this letter was extended to the plaintiff and the plaintiff's solicitor.

[39] However, on 30 January 1997, the solicitors of the plaintiff's financier informed the defendants' solicitor that the financier has cancelled the loan. The fourth extension was given by the defendants to the plaintiff at the request of Steven, subject to the variation.

[40] Upon the defendants' rejection of the plaintiff's request for further extension until 31 May 1997 and on the date of the defendants' termination of the SPA on 6 May 1997, the plaintiff had paid a sum of RM972,573.30 towards the purchase price. After forfeiting RM722,498.30 being 10% of the purchase price, the balance thereunder was RM250,075. The defendants have set off the interest of RM375,144.60 and filed the aforesaid counterclaim.

[41] On the other hand, the plaintiff's case relied solely on the affidavit of one Chua Tong Yeong ('Chua') a director of the plaintiff who affirmed that the plaintiff had never agreed to the variation which was still under discussion, as the variation was unreasonable and higher than that stated in the SPA and that the plaintiff's solicitor has been instructed that the variation was subject to the plaintiff's agreement.

[42] Chua also affirmed that he had taken an active role and had full knowledge of the plaintiff's transaction with the defendants and that Steven had passed away at the end of 1997. Chua had however never denied that Steven had initiated the series of negotiations with DD2 and 4 for the four extensions.

[43] The evidence adduced by the parties respectively in their affidavits pertaining to the existence or otherwise of the oral agreement on the variation is sharply conflicting. I would therefore follow the safer approach set out by Chang Min Tat FJ (as he then was) for the Federal Court in *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 at p 234B–C right column ie to refer to and rely on the witness' (the deponents) acts and deeds which were contemporaneous with the event and to draw reasonable inferences from them, adding that judicial reception of evidence requires that the oral evidence (in the instant case, the affidavits) be critically tested against the whole of the other evidence (in the instant case, by way of affidavits) and circumstances of the case and that plausibility should never be mistaken for veracity.

[44] The above approach was also applied by James Foong J (now JCA) in *Industrial Concrete Products Bhd v Concrete Engineering Products Bhd* [2001] 2 MLJ 332 at p 349E–H and by me in *Nuri Asia Sdn Bhd v Fosis Corporation Sdn Bhd* [2006] 5 CLJ 307.

[45] Upon a careful examination and evaluation of the affidavits filed herein, it is my specific finding of fact that the parties have embarked upon a series of negotiations at the request and initiative of Steven, the plaintiff's chief executive officer and the four extensions were given by the defendants to the plaintiff subject to conditions one of which was pre-eminently the variation. I accept the above three affidavits affirmed for the defendants and find the defendants' version as more credible, reasonable and probable.

[46] Although negotiations for extensions of time and the variation were oral in nature, these terms and conditions have been expressly stated in the letters of the defendants' solicitor to the plaintiff and the plaintiff's solicitor. The fact that Steven as the plaintiff's chief executive officer had found it necessary to request the defendants for a waiver of the variation for the month of January 1997 is an unqualified acceptance of the variation and an affirmation of the oral supplementary agreement between the parties which clearly fortifies and strengthens the defendants' version.

ANY VARIATION AS A MATTER OF LAW?

[47] It was submitted by plaintiff's learned counsel Miss Karen Cheah Yee Lynn that:

(1) There was no agreed variation which at best was a unilateral attempt by the defendants to do so citing *Chitty on Contracts* (28th Ed) Vol 1 para 23-032,*Yeow Kim Pong Realty Ltd v Ng Kim Pong* [1962] MLJ 118 and *The Ka Wah Bank Ltd v Nadinusa Sdn Bhd & Anor* [1998] 2 MLJ 350 and

(2) There was no provision in the SPA to vary its existing terms citing *Chiong Ah Hui v Ban Choon Co (Pte) Ltd* [1989] 2 MLJ 296, s 7 the Contracts Act 1950 and *Paul Murugesu s/o Ponnusamy (as representative of Nalamah d/o Sangapillay (deceased)) v Cheok Toh Gong & Ors* [1996] 1 MLJ 84

[48] The response of the defendants' learned counsel Mr SP Chandra is that the plaintiff has been given the four extensions subject to the variation and that the terms of the SPA may be varied either orally or in writing citing also *Chitty on Contracts* (8th Ed) p 1155 paras 23-032 to 034and *Paul Murugesu.*

[49] I shall now consider whether as a matter of law there is an agreement on the variation.

[50] It is trite law that parties to a contract may effect a variation of the contract by modifying or altering its terms by mutual agreement: see *Chitty on Contracts* (28th Ed) Vol 1 para 23-032.

[51] The terms of a deed or written instrument may be varied by a subsequent agreement, whether oral or written: see para 23-033, ibid. **A**

[52] The agreement which varies the terms of an existing contract must be supported by consideration which may be found in the mutual abandonment of existing rights or the conferment of new benefits by each party on the other: see para 23-034, ibid. **B**

[53] In my view, consideration in the instant case is constituted by the four extensions granted by the defendants to the plaintiff in return for which there was the variation. **C**

[54] In *Yeow Kim Pong Realty*, the Privy Council advised that the granting of an extension of time to pay the balance sum in a sale and purchase agreement for land subject to conditions laid down in the supplementary agreement by way of a letter was binding on the parties thereto. **D**

[55] In *Ka Wah Bank*, the relevant issue was whether there had been a settlement and compromise on the basis of series of letters exchanged between the parties. Mohamed Dzaiddin FCJ (later CJ Malaysia) speaking for the Federal Court held that the correct appproach was to consider the whole correspondence to see whether upon its true construction there was to be found in it an offer substantially accepted in **E** terms which constituted a contract and as the correspondence contained terms of settlement in the form of a definite offer which has been accepted, it was held that a settlement and compromise had been constituted.

[56] The parties in *Chiong Ah Hui* had abandoned the first sale and purchase **F** agreement but had entered into a fresh agreement. On the defendant's non-performance of the fresh agreement, the plaintiff applied for and obtained summary judgment for specific performance. Lamin J (later PCA) held the fresh agreement to be a complete agreement and therefore enforceable.

[57] In particular, reference to my specific finding of fact that there was an oral **G** supplementary agreement between the parties on the variation, *Yeow Kim Pong Realty*, *The Ka Wah Bank* and *Chiang Ah Hui* cited for the plaintiff actually militated against the plaintiff's contention.

[58] In my view, the negotiations alluded to above coupled with the **H** correspondences between parties and their solicitors including Steven's plea on behalf of the plaintiff for the waiver of the varied interest for the month of January 1997 with copies extended to them respectively would cumulatively constitute the absolute and unqualified acceptance by the plaintiff of the defendants' condition for variation in view of s 7(a) of the Contracts Act 1950 which reads: **I**

7 Acceptance must be absolute

In order to convert a proposal into a promise the acceptance must:

(a) be absolute and unqualified

(b) …

[59] In *Paul Murugesu*, the then Supreme Court in a judgment delivered by Peh Swee Chin SCJ (as he then was) held, inter alia, that both parties to an agreement are entitled to vary a term of the agreement either in writing or orally save in cases under s 92(d) but the agreement there was not one of those exceptions. A similar situation prevails in my specific finding of facts.

[60] In the circumstances, as a matter of law, I hold that there was a variation in the form of an oral supplementary agreement and that there is no merit in the plaintiffs contention herein.

SECTION 92 OF THE EVIDENCE ACT 1950

[61] It was canvassed for the plaintiff that oral variation cannot be accepted in the absence of documentary evidence, in view of *Segar Restu (M) Sdn Bhd v Wong Kai Chuan & Anor* [1994] 3 MLJ 530, s 92 of the Evidence Act 1950 (s 92') and *Voo Min En & Ors v Leong Chung Fatt* [1982] 2 MLJ 241.

[62] The defendants relied on s 92 and the first limb in proviso (d) to support the contention that the oral agreement is admissible as evidence

[63] In my judgment, it is to be noted that Chapter VI of the Evidence Act 1950 provides for the 'exclusion of oral by documentary evidence'. In general, s 91 provides that where the contents of a contract have been reduced to the form of a document or where the matter is required by law to be reduced to the form of a document, only that document may be admitted and it reads as follows:

> 91 Evidence of terms of contracts,…. reduced to form of documents
>
> When the terms of a contract have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of the contract, or of the matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

[64] Section 92 which reaffirms the general exclusion of evidence of any oral agreement for the purpose of contradicting, varying to or subtracting from its terms, reads:

> 92 Exclusion of evidence of oral agreement
>
> When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to s 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms:

[65] Hence, parol evidence was excluded where it sought to add a new term to a written agreement: *Tindok Besar Estate* at p 233H to the left column per Chang Min Tat FJ.

[66] To the above general rule, exceptions are contained in provisos (a) to (f) to s 92. Proviso (d) merits reproduction as follows:

> Provided that:
>
> (a) …;
>
> (b) …;
>
> (c) …;
>
> (d) the existence of any distinct subsequent oral agreement, to rescind or modify any such contract, grant or disposition of property, may be proved except in cases in which the contract, grant or dispositipn of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

[67] In considering the authorities cited for the plaintiff, I find that *Segar Restu* concerns an application for summary judgment based on the tort of trespass and has nothing to do with the law of contract which is the subject matter now litigated by the parties before me.

[68] Where eg a lease was in writing and registered in accordance with s 104 of the Sabah Land Ordinance and it provided for renewal by written request, evidence alleging that there was an oral agreement for a new lease was excluded by the Federal Court through the judgment of Salleh Abas FJ (later LP) in *Voon Min En*.

[69] As in *Paul Murugesu*, the oral agreement between the parties herein is admissible as it is a distinct subsequent agreement under s 92, the first limb in proviso (d) and it has modified cl 9 and para 1.

[70] For purposes of completeness, cl 9 and para 1 merit reproduction as follows:

> 9 PURCHASER'S DEFAULT
>
> Subject to clause 11 below, if the purchaser fails to pay the balance sum on the completion date as provided in cl 4 hereof it is hereby expressly agreed that the vendor will grant the purchaser an extension of sixty (60) days (hereinafter referred to as 'the extended completion date') from the completion date to settle the balance of the purchase price. The vendor shall be entitled to charge interest at the rate of 10% per annum calculated on a daily basis, until the balance of the purchase price is settled in full and should the purchaser at the end of the extended completion date still fail to settle the balance of the purchase price then the vendor shall have the absolute right to terminate this agreement by forfeiting such sum as stipulated in Part 10 of the First Schedule as agreed liquidated damages and any sum in excess thereof paid by the purchaser to the vendor shall be refunded to the purchaser after such forfeiture free of interest and thereafter this agreement shall be null and void and neither party hereto shall have any claims against the other, save and except for any antecedent breach.

THE SECOND SCHEDULE

SPECIAL EXPRESS CONDITIONS

It is hereby mutually agreed between the parties hereto that in the event the purchaser shall fail and/or neglect to pay any one (1) of the payments stated in Part 6(b) of the First Schedule herein, then the vendor shall be entitled to terminate this agreement and to forfeit all payments made by the purchaser to the vendor, subject however to a maximum of 10% of the total purchase price for the said property, as agreed liquidated damages. Any payment in excess of 10% of the total purchase price shall be refunded to the purchaser without any interest thereon.

[71] Clause 9 provides for the consequences which would flow from the purchaser's default in paying the balance sum on or before the completion date in which case the vendors (the defendants) would give the purchaser (the plaintiff) 60 days extension to settle the balance during which the vendors are entitled to interest at the rate of 10% calculated on a daily basis until the balance is settled in full. The 60-day extension has now been varied to the four extensions running into seven months while the 10%pa interest has been varied to 1% per month pursuant to the oral supplementary agreement of the parties herein.

[72] Paragraph 1 provides for the vendors' right to forfeit a maximum of 10% of the total purchase price in the event of the purchaser's failure to pay any one of the payments due under the SPA.

[73] On the facts and the law, I am unable to sustain the plaintiff's contention herein.

INTEREST FOR EXTENSIONS AND FORFEITURE

[74] It was submitted for the defendants that the payment of interest for the four extensions and the forfeiture of 10% of the purchase price are separate and distinct elements both of which the defendants are entitled relying on *Paramount Corporation Bhd v Mulpha Pacific Sdn Bhd* [1999] 5 CLJ 539 (HC).

[75] The plaintiff sought to distinguish *Paramount Corporation* on the facts, adding that cl 9 and para 1 only permit the forfeiture of 10% of the purchase price.

[76] The above submissions lead me to the conclusion that the parties are of the same mind in relation to the defendants' right under para 1 ie to forfeit a maximum sum of 10% of the total purchase price as agreed liquidated damages and the excess thereof shall be refunded to the purchaser without any interest thereon.

[77] The plaintiff's submission has not addressed nor rebutted the defendants' submission that cl 9 and para 1 encompass separate and distinct elements. In my judgment there can be no doubt that the granting of the four extensions was subject to the variation which has to be paid whether or not the SPA has been terminated.

[78] An authority in point is to be found in *Paramount Corporation* in which the shares sale and purchase agreement provide for the payment of interest for extension of time and for forfeiture of deposit for failing to pay the balance of the purchase price after two extensions. Clause 4.2 of that agreement is similar to cl 9 herein. I held, inter alia, that:

(1) the defendant there (as purchaser) was permitted to buy additional time to fulfil an obligation that had already fallen due and the defendant there has agreed contractually to make payment for that additional time (p 544d).

(2) the accrued agreed interest is a separate debt due from the defendant to the plaintiff there and must not be confused or 'merged' with the balance sum (p 545h); and

(3) the balance sum and the accrued agreed interest are considerations for separate and distinct elements. The balance sum is consideration for the purchase of the shares. The accrued interest is consideration for the plaintiff there (the vendor) being put out of use of money already due to the plaintiff and creates a separate debt payable by the defendant there. But for the defendant there agreeing to make payment of the accrued interest, the plaintiff will have terminated the sale agreement at an earlier date (p 546a–b).

[79] My judgment was subsequently affirmed by the Court of Appeal sub nom *Mulpha Pacific Sdn Bhd v Paramount Corp Bhd* [2003] 4 MLJ 357.

[80] In the circumstances, I uphold the defendants' above submission.

CONCLUSION

[81] Based on the foregoing grounds, my answer to question is in the affirmative ie under para 1, the rate of interest for the four extensions has by the parties' oral supplementary agreement been varied from 10% pa to 1% per month.

[82] My answer to question 3 is also in the affirmative ie the defendants are entitled to claim the varied interest on the balance sum after the termination of the SPA.

[83] In the circumstances, the answer to question 2 is rendered otiose.

[84] I therefore dismiss with costs the plaintiff's claim and except for D5, I allow with costs the defendants' counterclaim.

Defendants' counterclaim allowed with costs.

Reported by Sally Kee